

cause the unreported corruption or loss of data.” *Plaintiffs’ First Amended Original Class Complaint* [8] at p.3. “Plaintiffs purchased computers, or similar devices, sold or manufactured by Defendant, or that contain floppy diskette drives (‘FDDs’), floppy diskette controllers (‘FDCs’), or FDC instructions or commands in the form of microcode that were designed, sold, manufactured, transmitted or created by Defendant.” *Id.* at p.1. Plaintiffs seek injunctive relief and statutory damages under Title 18 U.S.C. § 1030 (the “Computer Fraud and Abuse Act”), revocation of acceptance under the Uniform Commercial Code (“UCC”), breach of contract and express and implied warranties, and declaratory relief under Title 18 U.S.C. § 1030. *Id.* at pp.10-15.

On January 28, 2000 Compaq delivered a plethora¹ of motions to this Court including *Compaq’s Motion for Recusal* [12] of the undersigned judge. Recusal? What for? Here’s the basis for Compaq’s motion for recusal:

Judge Richard Schell was originally assigned to this case. He recused himself. Thereafter, this case was assigned to Judge Howell Cobb. Judge Cobb recused himself because his wife has a computer. Compaq requests that this Court recuse itself because the Eastern District of Texas, Beaumont, Division Clerk’s office also has at least one Compaq computer.²

Compaq’s Motion for Recusal [12] at p. 1. Then, Compaq draws the following (rather tabloid-esque) analogy: “Judge Cobb recused himself because his wife has a Compaq computer. The analysis is identical where the Beaumont District Clerk has a Compaq computer.” *Id.* at p.3.

¹This Court first considered calling the motions a “phalanx” of motions. However, the phalanx was a tight group of Greek infantry with an impenetrable shell of soldiers’ shields and a lethal extension of their lances capable of piercing the strongest of armies. Out of respect for the Greeks, this Court will not liken these motions to the Greek phalanx. So plethora, not phalanx.

²Apparently, Compaq’s private investigator discovered the existence of this single, Compaq computer. See “Affidavit” of Andrew Lloyd James attached as “Exhibit A” to *Compaq’s Motion for Recusal* [12].

2. Law of Recusal

A. *Recusal*

The Code of Judicial Conduct says a “Judge shall disqualify himself in a proceeding in which his partiality might reasonably be questioned.” Code of Judicial Conduct, Canon 3(C)(1). Congress codified almost identical language in Title 28 U.S.C. § 455(a): “Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” Title 28 U.S.C. § 455(a). The purpose of Section 455(a) is “to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible.” Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847 (1988). Indeed, the Fifth Circuit further explained the statute’s purpose:

Judicial ethics reinforced by statute exact more than virtuous behavior; they command impeccable appearance. Purity of heart is not enough. Judge’s robes must be as spotless as their actual conduct. These expectations extend to those who make up the contemporary judicial family, the judge’s law clerks and secretaries.

Hall v. Small Business Admin., 695 F.2d 175, 176 (5th Cir.1983). However, both the legislative history of Section 455(a) and the Fifth Circuit admonish district courts faced with recusal motions to “. . . be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision.” In re Corrugated Container Antitrust Litigation, 614 F.2d 958, 966 n.18 (5th Cir.1980), cert. denied 1015 S.Ct. 244 (1980) (quoting the legislative history to § 455(a)); Switzer v. Berry, 198 F.3d 1255, 2000 WL 14407 *3 (10th Cir.Jan. 10, 2000) (noting Section 455(a) did not intend to give “litigants a veto power over sitting judges”).

B. *Standards and Test for Recusal*

The trial judge to whom a motion to recuse is directed is the proper judge to rule on the

motion and generally should not refer the motion to another judge. In re Corrugated, 614 F.2d at 963 n.9 (5th Cir.1980), cert. denied 1015 S.Ct. 244 (1980). Adopting a statement from WRIGHT & MILLER, the Fifth Circuit noted that, while a district judge facing a motion to recuse *may* refer the motion to recuse to another judge, “the adoption of such a procedure as a general rule would be unwise.” *Id.* Regardless, a motion to recuse under Section 455(a) is committed to the discretion of the district judge and denial will be reversed only upon a showing of abuse of discretion. Garcia v. Woman’s Hospital of Texas, 143 F.3d 227, 229-30 (5th Cir.1998).

The standard under Title 28 U.S.C. § 455(a) is objective: Would the allegedly disqualifying factor cause a *reasonable* person to question the *judge’s* impartiality? Liteky v. United States, 114 S.Ct. 1147, 1153-54 and 1156 n.2 (1994); Levitt v. University of Texas at El Paso, 847 F.2d 221, 224-26 (5th Cir.1988), cert. denied 109 S.Ct. 536 (1988); and Hall v. Small Business Admin., 695 F.2d 175, 179 (5th Cir.1983).

3. Analysis of Compaq’s Motion for Recusal

A. The Single Compaq Computer Located in the District Clerk’s Office

Let’s put it on the table—this is a highly questionable motion based upon an absurd analogy supported by absolutely no relevant authority. Again, here’s the basis for Compaq’s motion for recusal:

Judge Richard Schell was originally assigned to this case. He recused himself. Thereafter, this case was assigned to Judge Howell Cobb. Judge Cobb recused himself because his wife has a computer. Compaq requests that this Court recuse itself because the Eastern District of Texas, Beaumont, Division Clerk’s office also has at least one Compaq computer.³

Compaq’s Motion for Recusal [12] at p. 1. First, there is absolutely no evidence that the

³*See supra*, fn.2

Honorable Howell Cobb recused himself from this case “because his wife has a [Compaq] computer.” *Id.* Here’s Judge Cobb’s order of recusal in its entirety: “The undersigned judge hereby recuses himself in the above entitled and numbered cause.” *Order of Recusal* [7]. That’s it—there’s nothing there about his wife’s computer. Moreover, Compaq proffered absolutely no evidence that Judge Cobb recused himself because his wife owns a Compaq computer. Then, Compaq draws the following (rather tabloid-esque) analogy: “Judge Cobb recused himself because his wife has a Compaq computer. The analysis is identical where the Beaumont District Clerk has a Compaq computer.” *Id.* at p.3. The undersigned’s wife (and probably other wives of judges in this District) sure would take exception to this leap of logic. Regardless, Compaq’s explanation for Judge Cobb’s recusal is nothing short of pure speculation.⁴

Compaq nonetheless urges that, taking the Plaintiffs’ allegations as true, “the alleged data corruption affects the Clerk’s computer which corrupts the data used by the Judges of the Eastern District thereby making all of the Judges of the Eastern District injured parties.”

Compaq’s Reply to Plaintiffs’ Reponse to Compaq’s Motion for Recusal [] at p.1. Absurd. First, this Court takes judicial notice that there are approximately one hundred and ninety-four (194) computers in the Eastern District of Texas. This Court does not dispute that, on the first floor of this very courthouse, there sits a Compaq computer in the district clerk’s office—a lone, Compaq computer amidst a sea of one hundred and ninety-four (194) computers.⁴ Let’s assume

⁴Compaq’s cited cases don’t even come close to supporting either of its propositions: that the computer in the district clerk’s office is subjected to the same recusal analysis as one owned by Judge Cobb’s wife; or that property owned by the United States can be analogized to property owned by a judge’s wife. The reason? Compaq’s propositions are absurd.

⁴This Court does, however, take judicial notice that the particular computer Compaq complains about *is not even connected to the district server*. In fact, that particular computer simply prints receipts for litigants submitting filing fees and other payments.

the undersigned recused himself because of this single, Compaq computer located in the district clerk's office.⁵ What next? Should the undersigned recuse himself in a case involving an automobile manufacturer because the district clerk has bought a single van from the same manufacturer? Should the undersigned recuse himself in a case involving a photocopier manufacturer because the district clerk has bought a single copier from the same manufacturer? Better yet, should litigants' private investigators be allowed to root through the property of district clerk's offices to dig up something to bolster highly questionable motions to recuse what are perceived as unfavorable judges?⁶

The lack of authority to support Compaq's motion to recuse on this basis reveals its sheer frivolousness. The only Fifth Circuit case that comes close is Hall v. Small Business Administration, 695 F.2d 175 (5th Cir.1983). In that case the United States Magistrate had before him a putative class plaintiff alleging that a class should be certified against the Small

⁵The truly ironic thing about this whole ordeal is that the undersigned, his law clerks, and his secretary would have never even known about the computer had Compaq not filed this motion for recusal. By the way, Compaq offers no evidence that the Southern District of Texas does not own one, too. Indeed, considering the number of computers in this district, this Court suspects there a considerable number of computers in the Southern District, too. Indeed, absent a United States federal courthouse that operates via abaci and smoke signals, this Court seriously doubts Compaq could find a district clerk's office that functions without the use of several computers.

⁶As part of its plethora of motions, Compaq has also filed *Compaq's Motion to Dismiss for Lack of Federal Subject Matter Jurisdiction and Failure to State a Claim* [11] arguing Title 28 U.S.C. § 1030 (the "Computer Fraud and Abuse Act") cannot apply in its case. Well, this Court has already interpreted Title 28 U.S.C. § 1030 (the "Computer Fraud and Abuse Act") in a manner that cuts directly against Compaq's strained interpretation of Title 28 U.S.C. § 1030. See Shaw v. Toshiba, No. 1:99-cv-120, slip op. (E.D.Tex. Aug. 26, 1999) (Incidentally, that slip opinion will soon be published). The undersigned suspects Compaq filed this motion for recusal, in part, to remove its case from a judge who has interpreted Title 28 U.S.C. § 1030 in an unfavorable manner. By the way, *Compaq's Motion to Dismiss for Lack of Federal Subject Matter Jurisdiction and Failure to State a Claim* [11] will be denied in a separate memorandum and opinion order.

Business Administration (SBA) for discrimination against female employees. The magistrate employed as his sole law clerk a woman (a) who had worked at SBA prior to becoming his law clerk, (b) who had resigned her position from the SBA because she thought she had been discriminated against, (c) who had openly expressed her belief that the SBA was discriminatory in her resignation letter, and (d) who accepted a job with the plaintiff's lawyer while working on the case. Id. at p.177. The Fifth Circuit noted this conduct did indeed "give rise to an appearance of partiality." Id. at p.179. In so holding, the Fifth Circuit noted that law clerks are "sounding boards for tentative opinions and legal researchers who seek the authorities that affect decision" and that "[c]lerks are privy to the judge's thoughts in a way that neither parties to the lawsuit nor his most intimate family members may be."⁷ There is absolutely no language in Hall that would extend this rationale to employees of another office like the district clerk's office—that is, an office that (respectfully) has *absolutely nothing whatsoever to do with the undersigned's decision-making*. Conversely, the undersigned's law clerk assigned to this case has never been employed by Compaq nor has he accepted employment by *any* of the attorneys of record.⁸

B. The Law Clerk's Purchase of a Compaq Computer Roughly Five Years Ago

Compaq's investigation also revealed the law clerk assigned to this case, Mark Sparks, bought a Compaq computer in August of 1995. Citing Hall, Compaq argues this Court should recuse on that basis, too. The law clerk's (possible) position as a putative class member does not require the undersigned to recuse himself from this case. In an effort to paint a picture of some

⁷There's a scary thought.

⁸United States v. Monjar does involve the relationship between the federal district court and the federal district clerk; but it doesn't require the recusal of the district court. 154 F.2d 954 (3rd Cir.1946). Indeed, this case doesn't even talk about recusal.

sort of hostility by the law clerk toward Compaq thereby transmogrifying the present facts to fit the Hall standard, Compaq submits *its own account* of a service call wherein about five years ago the law clerk (then a law student) notified Compaq all the software was missing from his new computer.⁹ Again, here's Compaq's own account of the Plaintiffs' allegations (despite complaining the allegations are too "vague" and "ambiguous" to respond to them):

Floppy diskettes are devices that can be used to store and transport data. Data transfer to and from a floppy diskette is controlled by a hardware device called a floppy diskette controller or FDC. The FDC provides the interface between the computer's Central Processing Unit ("CPU") with the floppy diskette device. Since the floppy diskette is spinning, it is necessary for the FDC to provide data to the diskette drive at a specified data rate. Otherwise, the data can be written to the wrong location on the diskette. The FDC accounts for situations when the data is not adequate to support the rotating diskette. In such situations, the FDC aborts the operation and signals the CPU that a data underrun has occurred.

Compaq's Motion to Dismiss for Lack of Federal Subject Matter Jurisdiction and Failure to State a Claim [11] at pp.3-4. Not that it matters, but the law clerk just wanted the software with his computer; he did not call to complain about his FDC¹⁰ or related data storage problems. This is quite different than the situation in Hall where the law clerk had actually brought charges of *discrimination* against a defendant standing accused of *discrimination*, openly expressed her belief that the defendant engaged in *discrimination*, and then took a job from the plaintiff's lawyer (while working on the case) who was suing the defendant for *discrimination*. Again, the law clerk assigned to this case, Mark Sparks, has never contacted Compaq to complain about the alleged FDC defect; has never openly expressed his belief that Compaq computers contain the

⁹Incidentally, this Court takes judicial notice that the law clerk purchased his Compaq computer roughly five years ago for law school (which he repeatedly assures the undersigned he attended despite occasional reservation).

¹⁰Indeed, at that point he didn't even know what one was.

alleged FDC defect; and has not accepted any job from any of the attorneys of record.

Analogizing the undersigned's law clerk to the law clerk in Hall is as strained as analogizing the undersigned's relationship with the district clerk to the relationship between Judge Cobb and his wife.


4. Conclusion

First, Compaq guesses that Judge Cobb recused himself because his wife owns a Compaq computer. Pure speculation. Then, building on that sheer speculation, Compaq analogizes the relationship between Judge Cobb and his wife to the relationship between the undersigned and the employees in the district clerk's office in order to support its motion for recusal. Strained analogizing. Alternatively, Compaq argues the existence of one lone, Compaq computer amidst a sea of one hundred and ninety-four (194) computers necessarily requires recusal of all nine of the Article III judges presiding in the seven geographic divisions for the Eastern District of Texas—judges appointed over a span of nine United States Presidents. Absolutely ridiculous. In a last minute grasp, Compaq notes that, about five years ago, the undersigned's law clerk bought a Compaq computer and called to inform the company his software was missing. Strained analogizing, again. Well, a reasonable person would not question every Eastern District of Texas judge's impartiality simply because there is a single piece of property manufactured by a defendant sitting somewhere in some district clerk's office; additionally, a reasonable person would not question the undersigned's impartiality simply because his law clerk bought property manufactured by the defendant roughly five years ago.

Accordingly, this Court DENIES *Compaq's Motion for Recusal* [12].

It is SO ORDERED.

Signed this 28th day of February, 2000.



Thad Heartfield
United States District Judge